

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

STEVEN B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C22-5131-MLP

ORDER

I. INTRODUCTION

Plaintiff seeks review of the denial of his application for Supplemental Security Income. Plaintiff contends the administrative law judge (“ALJ”) erred in discounting certain medical opinions as well as Plaintiff’s testimony. (Dkt. # 18 at 1.) As discussed below, the Court AFFIRMS the Commissioner’s final decision and DISMISSES the case with prejudice.

II. BACKGROUND

Plaintiff was born in 1971, has an 11th-grade education, and has worked as a cement finisher. AR at 41-43. Plaintiff was last gainfully employed in 2008. *Id.* at 41.

In April 2017, Plaintiff applied for benefits, alleging disability as of February 24, 2010. AR at 268-73. Plaintiff’s application was denied initially and on reconsideration, and Plaintiff

1 requested a hearing. *Id.* at 149-52, 156-61. After the ALJ conducted a hearing in 2018, the ALJ
2 issued a decision finding Plaintiff not disabled. *Id.* at 128-40.

3 The Appeals Council granted Plaintiff's request for review, and remanded the case to the
4 ALJ for further administrative proceedings. AR at 146-47. A different ALJ held a hearing in
5 March 2021 (*id.* at 34-74), and subsequently issued a decision finding Plaintiff not disabled. *Id.*
6 at 15-27.

7 As the Appeals Council denied Plaintiff's request for review, the ALJ's decision is the
8 Commissioner's final decision. AR at 1-6. Plaintiff appealed the final decision of the
9 Commissioner to this Court. (Dkt. # 4.)

10 **III. LEGAL STANDARDS**

11 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
12 security benefits when the ALJ's findings are based on legal error or not supported by substantial
13 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a
14 general principle, an ALJ's error may be deemed harmless where it is "inconsequential to the
15 ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
16 (cited sources omitted). The Court looks to "the record as a whole to determine whether the error
17 alters the outcome of the case." *Id.*

18 "Substantial evidence" is more than a scintilla, less than a preponderance, and is such
19 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
20 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th
21 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical
22 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d
23 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may

1 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*
2 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one
3 rational interpretation, it is the Commissioner’s conclusion that must be upheld. *Id.*

4 IV. DISCUSSION

5 A. The ALJ Did Not Err in Discounting Plaintiff’s Testimony

6 The ALJ summarized Plaintiff’s allegations and explained that he discounted them
7 because: (1) the physical examination findings are “primarily unremarkable and inconsistent”
8 with the degree of limitation that Plaintiff asserts, (2) Plaintiff symptoms improved with
9 treatment, and (3) Plaintiff’s mental findings are generally normal and his symptoms improved
10 with medication. AR at 20-24. Absent evidence of malingering, an ALJ must provide clear and
11 convincing reasons to discount a claimant’s testimony. *See Burrell v. Colvin*, 775 F.3d 1133,
12 1136-37 (9th Cir. 2014).

13 Plaintiff contends that the ALJ’s reasoning was erroneous.¹ Plaintiff first argues that that
14 the ALJ should have relied on medical opinions rather than attempt to resolve conflicts in the
15 medical record himself. (Dkt. # 18 at 13.) But it is the ALJ who is tasked with resolving conflicts
16 in the record, and Plaintiff has not shown that the ALJ erred in looking to the record as a whole
17 when assessing the reliability of Plaintiff’s allegations. *Treichler v. Comm’r of Social Sec.*
18 *Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014) (“[W]e leave it to the ALJ to determine credibility,
19 resolve conflicts in the testimony, and resolve ambiguities in the record.”); *Thomas*, 278 F.3d at
20 956-57 (“When there is conflicting medical evidence, the Secretary must determine credibility
21 and resolve the conflict.” (cleaned up)).

22
23 ¹ Plaintiff states that the ALJ discounted his testimony based on his daily activities. (Dkt. # 18 at 12-13.)
The ALJ did not rely on this basis, however, and Plaintiff’s challenge to such a finding therefore fails to
establish error in the ALJ’s decision.

1 Plaintiff also argues that the ALJ erred in describing his treatment as conservative
2 because it included surgery and “heavy” pain medication. (Dkt. # 18 at 13.) The ALJ
3 acknowledged Plaintiff’s surgery and medication, however. In one part of the decision the ALJ
4 referred to Plaintiff’s epidural steroid injections and physical therapy as “conservative treatment”
5 (AR at 22), and Plaintiff has not shown that the ALJ erred in this characterization.

6 To the extent that Plaintiff also argues that the ALJ erred in failing to account for the side
7 effects of his pain medication (dkt. # 18 at 13 (citing AR at 65 (Plaintiff’s testimony that
8 Tramadol makes him feel “spacey”))), the ALJ cited evidence that Plaintiff reported
9 improvement with medication (AR at 24 (citing *id.* at 795, 806, 837)), and Plaintiff did not
10 mention any side effects to his providers at those times. Moreover, Plaintiff also denied side
11 effects in his agency paperwork (*id.* at 369), and the ALJ found Plaintiff’s largely normal
12 findings as to *inter alia* concentration to be inconsistent with the mental limitations he alleged.
13 *See id.* at 23-24. Plaintiff has not shown that the ALJ overlooked or failed to account for
14 evidence of Plaintiff’s medication side effects.

15 Plaintiff has failed to establish that the ALJ erred in discounting his testimony based on a
16 lack of corroboration in and contradiction with the record of Plaintiff’s treatment for physical
17 and mental complaints, as well as his improvement with treatment. Accordingly, the Court
18 affirms the ALJ’s assessment of Plaintiff’s testimony.

19 **B. The ALJ Did Not Err in Assessing Medical Opinion Evidence**

20 Plaintiff challenges the ALJ’s assessment of certain medical opinion evidence, which the
21 Court will address in turn.
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23

1 1. *Legal Standards*

2 Under regulations applicable to this case, the ALJ is required to articulate the
3 persuasiveness of each medical opinion, specifically with respect to whether the opinions are
4 supported and consistent with the record. 20 C.F.R. § 416.920c(a)-(c). An ALJ's consistency and
5 supportability findings must be supported by substantial evidence. *See Woods v. Kijakazi*, 32
6 F.4th 785, 792 (9th Cir. 2022).

7 2. *The ALJ Did Not Err in Assessing the Opinions of Debbie Turner, ARNP,*
8 *and Brent Packer, M.D.*

9 Ms. Turner, Plaintiff's treating nurse, completed a DSHS form opinion in March 2019
10 indicating that Plaintiff was unable to meet the demands of even sedentary work. AR at 943-47.
11 Dr. Packer had reviewed medical evidence for DSHS in May 2017 and found that Plaintiff was
12 limited to sedentary work with additional limitations in postural activity and gross/fine motor
13 skills. *Id.* at 609-11, 925.

14 The ALJ found the opinions of Ms. Turner and Dr. Packer to be unpersuasive because
15 their conclusions were inconsistent with Plaintiff's examinations after his back operation, and
16 unsupported by Ms. Turner's physical examination findings. AR at 24. Plaintiff acknowledges
17 that Dr. Packer reviewed pre-surgery records, but emphasizes that Ms. Turner was aware of
18 Plaintiff's post-operative progress and "was in the optimum position" to evaluate the limitations
19 that persisted. (Dkt. # 18 at 7.) Plaintiff also notes that Ms. Turner prescribed Plaintiff
20 medication, which indicated that she believed his pain allegations. (*Id.* at 7-8.)

21 Plaintiff has failed to establish that the ALJ erred in finding Ms. Turner's conclusions to
22 be inconsistent with the post-operation treatment notes. Specifically, Plaintiff's treatment notes
23 indicate that he used a back brace immediately after his surgery and was instructed to begin
 weaning off the use of the brace by October 2018. AR at 936, 939. At his next appointment, in

1 December 2018, he reported continued improvement and did not mention using a back brace. *Id.*
2 at 931. By March 2019, Plaintiff reported that his pain had dropped to 3/10, he was walking
3 without difficulty, and he reported no weakness or balance problems. *Id.* at 927-28. Plaintiff's
4 treating providers recommended that he "gradually return to all normal activities as tolerated" in
5 March 2019. *Id.* at 929.

6 These treatment notes are inconsistent with Ms. Turner's opinion that in March 2019
7 Plaintiff required a back brace for walking; that he could not sit, walk, or stand for any length of
8 time; and that his back pain prevented him from engaging in any form of work activity. AR at
9 943-44. The ALJ reasonably found Ms. Turner's opinion to be inconsistent with the
10 contemporaneous treatment notes and did not err in finding it unpersuasive on that basis.

11 Although Plaintiff emphasizes that Ms. Turner treated Plaintiff and prescribed medication (dkt.
12 # 18 at 7-8), neither of these facts pertains to whether her conclusions were consistent with the
13 record. The ALJ properly considered whether Ms. Turner's conclusions were consistent with the
14 record, reasonably found them to be inconsistent, and did not err in finding her opinion
15 unpersuasive on that basis.

16 Plaintiff's post-operation treatment notes are also inconsistent with Dr. Packer's 2017
17 opinion, which was rendered before Plaintiff's condition improved with surgery. Thus, although
18 Plaintiff contends that Dr. Packer's conclusions are consistent with Ms. Turner's findings (dkt.
19 # 18 at 7), because the ALJ properly found Ms. Turner's opinion to be unpersuasive, Ms.
20 Turner's opinion does not bolster Dr. Packer's conclusions. Because Dr. Packer's opinion is
21 inconsistent with the evidence of Plaintiff's improvement after surgery, the ALJ did not err in
22 finding it unpersuasive.

1 To the extent that Plaintiff also alleges that the ALJ erred in crediting State agency
 2 opinions rendered before Plaintiff's back surgery (dkt. ## 18 at 7, 20 at 2-3), the Court finds no
 3 merit in Plaintiff's argument that the ALJ erred in finding the State agency opinion to be
 4 consistent with evidence that the consultants did not review. The ALJ properly considered the
 5 State agency opinions in light of the entire record before him, and found it to be consistent with
 6 the evidence of Plaintiff's improved functioning after surgery. AR at 24. Although the State
 7 agency consultants reviewed the records before Plaintiff's surgery, and thus could not have relied
 8 on those records in rendering their conclusions, the regulations nonetheless instruct the ALJ to
 9 consider medical opinions in the context of the entire record. *See* 20 C.F.R. §416.920c(c)(2).
 10 Plaintiff has not shown that the ALJ erred in finding the State agency opinions consistent with
 11 the evidence of Plaintiff's improvement after surgery.

12 3. *The ALJ Did Not Err in Assessing the Opinions of Dennis Kelly, Ph.D.*

13 Dr. Kelly examined Plaintiff in June 2017 and wrote a narrative opinion describing his
 14 mental symptoms and limitations. AR at 590-94. Dr. Kelly's medical source statement reads as
 15 follows:

16 The claimant interacted satisfactorily with the examiner, and his social skills appear
 17 to be adequate. On the cognitive mental status examination he performed variably.
 18 Ability to reason and overall memory were fair. On the other hand, fund of
 knowledge and sustained concentration were rather poor.

19 The claimant's ability to complete a normal workday or work week without
 20 interruption from both mental health and medical symptoms is at least moderately
 21 impaired. He appears to have little ability to tolerate the usual stresses encountered
 in a typical workplace, particularly if they are physical in nature. His adaptation to
 new or challenging situations is felt to be poor. The claimant might represent a
 candidate for vocational rehabilitation services, were it not for the fact that other
 employment options are limited due to his formal education being low.

22 *Id.* at 594. The ALJ found Dr. Kelly's opinion to be unpersuasive because: (1) his conclusions
 23 are inconsistent with the "generally normal" mental status examinations; and (2) his conclusions

1 are not supported by his own mental status examination, which indicated “no more than
2 moderate cognitive impairment[.]” *Id.* at 25.

3 Plaintiff suggests that Dr. Kelly’s opinion was persuasive because Dr. Kelly witnessed
4 the “melding together” of Plaintiff’s physical pain and mental impairments, because Dr. Kelly
5 did not find any evidence of malingering, and because Dr. Kelly went into more depth than other
6 providers who wrote opinions. (Dkt. # 18 at 11-12.) This alternative interpretation of the
7 evidence does not establish error in the ALJ’s reasons to find Dr. Kelly’s opinion unpersuasive,
8 however. Plaintiff has not shown that the ALJ erred in finding that the other mental status
9 examinations in the record (AR at 751, 760-61, 763, 765) were generally normal, or that many of
10 Dr. Kelly’s own mental status examination findings (*id.* at 592-93) were normal as well.

11 Because Plaintiff has not shown that the ALJ erred in finding Dr. Kelly’s conclusions to
12 be inconsistent with and unsupported by objective findings, Plaintiff has failed to establish error
13 in the ALJ’s assessment of Dr. Kelly’s opinion.

14 V. CONCLUSION

15 For the foregoing reasons, the Commissioner’s final decision is **AFFIRMED**, and this
16 case is **DISMISSED** with prejudice.

17 Dated this 19th day of September, 2022.

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20 MICHELLE L. PETERSON
21 United States Magistrate Judge
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